

CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN: FACTS ON WOMEN'S WAGES AND PENDING LEGISLATION

More than forty-five years ago, President Kennedy signed the Equal Pay Act (EPA)¹ into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. The following year, Title VII of the Civil Rights Act of 1964 was enacted, making it illegal to discriminate, including in compensation, on the basis of sex, race, color, religion, and national origin. At the time of the EPA's passage in 1963, women earned merely 59 cents to every dollar paid to men.² Although enforcement of the EPA and Title VII have helped to narrow the wage gap, significant disparities remain and must be addressed.

Congress has recently taken steps to improve the laws that govern pay discrimination. After the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* severely limited workers' ability to vindicate their rights under federal anti-discrimination laws, President Obama signed the Lilly Ledbetter Fair Pay Act as his first piece of substantive legislation.³ The Act reverses the Supreme Court's harmful decision and restores the protection against pay discrimination that it stripped away. The Act makes clear that pay discrimination claims on the basis of sex, race, national origin, age, religion and disability may be filed when a discriminatory pay decision or practice is adopted, when a person becomes subject to the decision or practice, or when a person is otherwise affected by the decision or practice, "including each time an employee receives a discriminatory paycheck."

Although the Ledbetter Fair Pay Act was a major step forward in addressing the wage gap for women, it simply reaffirms what had been long accepted law prior to the Supreme Court's decision in *Ledbetter*. More is necessary both to strengthen equal pay laws, which have been weakened over time by courts, and to require the federal government to be more proactive in preventing and battling wage discrimination. For example, the House passed the Paycheck Fairness Act, introduced by Representative Rosa DeLauro, in January 2009,⁴ and it is critical that the Senate follow suit. In addition, Congress should promptly enact the Equal Remedies Act, which would remove arbitrary limits on damages in discrimination cases, and the Fair Pay Act, which would ensure equal pay to those with jobs that require equivalent skills, effort, responsibility, and working conditions.

In these critical economic times, closing the gender wage gap is an important tool to provide much needed economic stimulus for women and their families.

The Gender Wage Gap Persists

Wage disparities are of particular concern in light of the present economy. More than 15.1 million women – about one in eight – are poor, and women were 35 percent more likely to live in poverty than men in 2008. While it is well-documented that men have been hit hard by the current recession, women are suffering too: In December 2009, women's unemployment jumped to 8.2 percent, the highest rate in over 26 years. Unemployment among women who head families jumped to 13 percent, and long-term unemployment is higher than ever: four in

ten jobless women and men—over 6.1 million workers—have been unemployed for six months or more.⁵ For women who still hold their jobs, their earnings are increasingly important to ensuring family economic security: women account for nearly half of all workers (49.9% in December 2009)⁶ and, in 2008, nearly 40% of mothers were the primary breadwinners for their families while an additional quarter of mothers were co-breadwinners.⁷ Making sure women are fairly paid is a key tool to address these economic realities.

- In 2008, women working full-time, year-round were paid only 77 cents for every dollar earned by men. The median earnings of white, non-Hispanic women working full-time, year-round were \$37,389 compared to \$51,244 for white, non-Hispanic men, meaning they earned only 73 cents for every dollar earned by their male counterparts.⁸
- The gender wage gap is exacerbated by race and national origin; minority women fare significantly worse when compared to white, non-Hispanic men. In 2008, African American women working full-time, year-round earned 61% of the wages of white, non-Hispanic men (\$31,489 compared to \$51,244) while Hispanic women earned just 52% of the wages of white, non-Hispanic men (\$26,846).⁹ This means that an African American woman earned just 61 cents for every dollar earned by a white, non-Hispanic man, while a Hispanic woman earned only 52 cents on the dollar compared to white, non-Hispanic males.¹⁰
- An earnings gap exists between women and men across a wide spectrum of occupations. In 2008, for example, the median weekly wages earned by women physicians were just 64% of the median weekly wages of male physicians.¹¹ Women in sales and sales-related occupations earned only about 65% of the median weekly wages of men in equivalent positions.¹² While the gap is narrower in some occupations, it is still substantial. Women in the mining industry, for example, earned median weekly wages that were only 78% of what their male counterparts earned.¹³ And women in computer and mathematical occupations had weekly earnings that were 82% of the wages paid their male counterparts.¹⁴
- In some occupations, women have actually lost ground. For example, in a study of management positions in 10 industries that together employ over 70% of women in the workforce, the U.S. Government Accountability Office (then the General Accounting Office) found that women managers consistently made less than their male counterparts; in seven of the 10 industries, the pay gap had *increased* between 1995 and 2000.¹⁵
- The earnings gap between women and men also persists across all educational levels.¹⁶ While education lifts all boats, it lifts men's boats much higher than women's. For example, in 2008 among workers 25 years of age and older with some high school education, women's median annual earnings were \$14,707, compared to \$23,831 for men.¹⁷ Graduation from high school boosted women's median earnings to \$22,298, yet the same high school degree yielded \$33,936 for men.¹⁸ Even a two-year associate's degree gives men a much bigger bang for their buck (\$45,077 in median annual earnings) than it does for women (\$30,865).¹⁹ And while earning a bachelor's degree yielded a median annual of income of \$40,225 for women, it produced a whopping \$60,294 for men.²⁰ In fact, the pay gap is widest among non-Hispanic white men and women: non-Hispanic white men with just a high school diploma make almost as much (\$36,581) as non-Hispanic white women who have graduated from college (\$39,965).²¹

- There is not a single state in which women have gained economic equality with men.²² As of 2008, Washington, D.C. was the area with the smallest wage gap, at 88%, whereas Wyoming had the widest gap, with women making about 64% of what men earned.²³
- Women begin their careers facing a pay gap, and as women get older, the wage gap for them widens. Females aged 15 to 24 working full-time, year-round have median annual earnings that are 87% of what their male counterparts earn.²⁴ By the time they reach the critical years leading up to retirement, that 13% pay gap has more than doubled: women aged 45 to 64 who work full-time, year-round earn only 73% of what men do.²⁵
- If women in the workforce earned the same amounts as men who work the same number of hours, have the same education, age, and union status and live in the same region of the country, their annual family income would rise by about \$4,000 and their poverty rates would be cut by half or more.²⁶ The Institute for Women’s Policy Research has calculated that a typical woman who graduated college from 1984 and who was in her mid-40s in 2004 has lost more than \$440,000 during that period due to the wage gap.²⁷ Similarly, the Center for American Progress found that women lose \$434,000 over their lifetimes as a direct result of the gender pay gap.²⁸ For women in the workforce, closing the gender wage gap is an important tool to enhance their family incomes and provides needed economic stimulus to families during these difficult economic times.
- Pay inequity also follows women into retirement. Unmarried women in the workforce today will receive, on average, about \$8,000 a year less in retirement income than their male counterparts; even controlling for number of years worked and educational levels, the pay gap during prime working years, plus spending a career in a female-dominated job, accounts for two-thirds of that retirement income gap.²⁹ Women’s loss of income in retirement due to pay inequity during their working years shows up primarily in their pensions and savings, not their Social Security. To the contrary, Social Security’s progressive benefit formula and spousal benefits help women to counteract the effects of wage discrimination.³⁰

The Wage Gap Reflects Sex Discrimination

The wage gap cannot be dismissed as the result of “women’s choices” in career and family matters. In fact, recent authoritative studies show that even when all relevant career and family attributes are taken into account, there is still a significant, unexplained gap in men’s and women’s earnings. Thus, even when women make the same career choices as men and work the same hours, they still earn less.

- A 2003 study by U.S. Government Accountability Office (then the General Accounting Office) found that, even when all the key factors that influence earnings are controlled for — demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure — women still earned, on average, only 80% of what men earned in 2000.³¹ That is, there remains a 20% pay gap between women and men that cannot be explained or justified.
- One extensive study that examined occupational segregation and the pay gap between women

and men found that, after controlling for occupational segregation by industry, occupation, place of work, and the jobs held within that place of work (as well as for education, age, and other demographic characteristics), about one-half of the wage gap is due solely to the individual's sex.³²

- The wage gap between men and women starts within one year after college graduation: women working full-time earn only 80 percent as much as their male counterparts, at a time when the vast majority of women and men are likely not to have taken time out of the workforce.³³

Studies like these are borne out by case after case, in the courts and in the news, of suits brought by women charging their employers with wage discrimination. The evidence shows that sex discrimination in the workplace is still all too prevalent. Recent examples of pay discrimination cases include:

- In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boys' network for promotions that prevented women's career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because "God made Adam first." Another woman alleged that when she applied for a raise, her manager said, "Men are here to make a career, and women aren't. Retail is for housewives who just need to earn extra money."³⁴ The Ninth Circuit recently reaffirmed the case as a class action on behalf of more than 1.5 million women who are current and former employees of Wal-Mart.³⁵
- In February 2007, a federal judge approved a \$2.6 million settlement against Woodward Governor Company for gender discrimination with respect to pay, promotions and training. The Equal Employment Opportunity Commission (EEOC) sued the global engine systems and parts company on behalf of female employees working at two of the company's plants. Pursuant to the terms of the agreement, an outside individual will oversee the company's implementation of and compliance with the settlement, including the development of written job descriptions for the positions at issue as well as performance appraisals and a compensation review process.³⁶
- In 2004, on the eve of trial, investment house Morgan Stanley agreed to settle a sex discrimination class action filed by the EEOC alleging that the investment firm paid women in mid- and upper-level jobs less than men, passed women over for promotions, and committed other discriminatory acts. Although it denied the allegations, Morgan Stanley did agree to pay \$54 million to the plaintiffs and to take numerous other actions to prevent discrimination in the future.³⁷
- In 2004, Wachovia Corporation admitted no wrongdoing but agreed to pay \$5.5 million to settle allegations by the U.S. Office of Federal Contract Compliance Programs that it engaged in compensation discrimination against more than 2,000 current and former female employees over six years.³⁸
- Clearly, sex discrimination plays a major role in producing and sustaining the wage gap for

women. It is thus hardly surprising that public opinion surveys consistently show that ensuring equal pay is among women's top work-related priorities. For instance, nine in 10 women responding to the "Ask a Working Women Survey" conducted by the AFL-CIO in 2004 rated "stronger equal pay laws" as a "very important" or "somewhat important" legislative priority for them.³⁹ Similarly, a January 2007 national survey of 1000 unmarried adult women by Women's Voices Women Vote found that 73% of respondents said that support for pay equity legislation would make them "much more likely" to support a Congressional candidate.⁴⁰

Legislation Is Needed to Close Loopholes in the Law, Reverse Rollbacks in Federal Enforcement, and Promote Truly Equal Pay for Equal Work

Unfortunately, the way courts have interpreted Title VII and the Equal Pay Act is insufficient to remedy persistent wage disparities and demonstrates the need for stronger laws to ensure that women are paid equal wages for equal work. The Lilly Ledbetter Fair Pay Act was a critical piece of a larger series of legislative reforms necessary to accomplish these goals. But more is necessary to close the pay gap, including the bills discussed below:

The Paycheck Fairness Act

Enactment of the Paycheck Fairness Act, passed by the House of Representatives in January 2009 and pending in the Senate, would update and strengthen the EPA in important ways:

- **The Act Would Reinstate Pay Equity Programs and Enforcement at the Department of Labor**

The Act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the agency that oversees the nondiscrimination and affirmative action obligations of federal contractors.⁴¹ The Act also directs the Department to implement the Equal Opportunity Survey, a vital tool for detecting wage and other types of discrimination.⁴²

- **The Act Would Spark the Development of Salary Negotiation Skills Training**

The Act establishes a competitive grant program to develop training programs for women and girls on how to negotiate better compensation packages, and directs the Secretaries of Labor and Education to integrate the programs developed into education and job training programs under their respective jurisdictions.

- **The Act Would Increase Training, Research, and Education**

The Act provides for increased training for EEOC employees to help them identify and respond to wage discrimination claims. It also calls for enhancing various research and education programs at the Department of Labor, including programs to research ways to eliminate gender-based pay disparities and provide information to employers to assist them in eradicating such disparities.

- **The Act Would Improve Collection of Pay Information by the EEOC**

With limited exceptions designed to enable employers to protect proprietary information, the Act requires the EEOC to survey pay data already available and issue

regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

- **The Act Would Prohibit Employer Retaliation**

The Act prohibits employers from punishing employees for sharing salary information with their coworkers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.

- **The Act Would Close a Loophole in the Employer Defense**

Under the EPA, when an employer is found to be paying a female employee less than a male employee for equal work, the employer may assert an "affirmative defense"⁴³ that the pay differential is based on a "factor other than sex."⁴⁴ Some employers have argued for interpretations of this affirmative defense that are so broad (e.g., to include factors such as a male worker's stronger salary negotiation skills or an assumption that women will work for less) that they may themselves be "based on sex" and would seriously undermine the EPA.⁴⁵ The Act tightens this affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance. This defense is in addition to other defenses available to employers, namely that a pay differential is based on seniority, merit, or the quantity and quality of production.

- **The Act Would Modify the "Establishment" Requirement**

Under the EPA, in order to determine that there is wage discrimination, a wage comparison must be made between employees working at the same "establishment."⁴⁶ Some courts have interpreted this to mean that wages paid in different facilities or offices of the same employer cannot be compared even if the employer is paying workers different salaries for the same work.⁴⁷ The Act clarifies that a comparison need not be between employees in the same physical place of business; instead, courts must look as well to the salaries of employees who work for the same employer at workplaces located in the same county or political subdivision of a state.

- **The Act Would Improve Equal Pay Act Remedies**

The Act toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for back pay and, in some cases, liquidated (fixed and limited) damages, which tend to be insubstantial and insufficient to either fully compensate those subject to pay discrimination or to deter future employer violations of the law. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available.

- **The Act Would Facilitate Class Action Equal Pay Act Claims**

The Act allows an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure (FRCP). Class actions are important because they ensure that relief will be provided to all those who are injured by the unlawful practice. Currently, it is very difficult to bring EPA suits as class actions because the EPA, adopted prior to the current

federal class action rule (FRCP Rule 23), requires plaintiffs to opt *in* to a suit. Under the federal rule, class members are automatically considered part of the class until they choose to opt *out* of the class.

Equal Remedies Act

Enactment of the Equal Remedies Act, introduced in the 110th Congress by Senator Edward M. Kennedy to eliminate the arbitrary caps on compensatory and punitive damages for intentional discrimination claims under Title VII, would provide important incentives for employers to comply with Title VII and would reduce current inequity in civil rights laws.

- **The Act Would Remove An Arbitrary Inequity In Civil Rights Law**

The Act will put wage discrimination on the basis of sex, disability and religion on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available. The remedies available to those subject to unlawful conduct should not depend on the basis for the discrimination; women and men who endure sex-based discrimination, or discrimination based on disability or religion, should be entitled to the same remedies as those available in race and national origin cases.

- **The Act Would Remove A Unique Burden For Women of Color**

The Act will ensure that women of color are afforded the same remedies for discrimination as men of color. Currently, when women of color bring combined race and sex discrimination claims, they run the risk of having their race-based claims dismissed and their race-based remedies limited, since it is in the employer's interest to characterize any discrimination as sex-based and therefore subject to the caps.

- **The Act Would Remove the Artificial Limit on Damages**

The Act will allow compensatory damages to be based on actual injuries. Because a cap on damages sets an artificial limit on the amount that an individual can recover, the ultimate award in some cases is insufficient to compensate the plaintiff for the injuries s/he has suffered. In fact, the arbitrary cap on damages penalizes those who are the most seriously injured – plaintiffs who suffer the greatest injury as a result of discrimination are the ones most likely to end up not being fully compensated for their losses.

- **The Act Would Provide An Appropriate Deterrent Against Discrimination.**

Capped damages create perverse incentives, allowing employers to gamble that it costs less to pay damages than to create workplaces free of discrimination. This is contrary to the intent of Title VII, which encourages voluntary compliance by employers. Congress did not intend to encourage for employers to bury discrimination in the cost of doing business, and the Act removes this incentive.

Fair Pay Act

Far too many occupations in the United States remain dominated by one gender. In female-dominated fields, moreover, wages have traditionally been depressed and continue

to reflect the artificially suppressed pay scales that were historically applied to so-called “women’s work.” The Fair Pay Act, introduced by Senator Tom Harkin (D-IA), would address this problem by extending the reach of the equal pay laws in the following ways:

- **The Act Would Provide Equal Pay for Equivalent Jobs**

The Fair Pay Act equalizes wages between jobs that are segregated on the basis of sex, race, or national origin, but require equivalent skills, effort, responsibility, and working conditions.

- **The Act Would Protect Victims of Wage Discrimination**

Similar to the Paycheck Fairness Act, the Fair Pay Act provides punitive and compensatory damages to victims of wage discrimination. It also prohibits retaliation against individuals who exercise their rights under the law.

- **The Act Would Require Employer Record Keeping**

The Act requires all employers to keep records of the methods they use to set employee wages. Employers must also provide yearly reports to the EEOC that describe their workforce by position and salary as well as gender, race, and ethnicity.

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In sum, Congress must act to pass all three of these laws expeditiously to address the wage gap for women. Laws against pay discrimination have been weakened by the courts, leaving employees with few effective tools. It therefore is critical that Congress strengthen these laws to help realize the decades-old promise of equal pay for equal work and to promote economic self-sufficiency for women and their families.

¹ 29 U.S.C. § 206(d).

² U.S. Census Bureau, Historical Income Tables – People, Table P-40: Woman's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin: 1960 to 2007, available at <http://www.census.gov/hhes/www/income/histinc/p40.html> (last visited April 17, 2009).

³ Public Law No. 111-2, 123 Stat. 5 (2009).

⁴ Pursuant to the provisions of H.Res. 5, the text of the Paycheck Fairness Act, H.R. 12, was passed by the House and appended to the end of the Ledbetter Fair Pay Act, H.R. 11. The Senate bill, S. 182, has not yet passed.

⁵ NWLC calculations from U.S. Department of Labor, Bureau of Labor Statistics, “The Employment Situation: December 2009,” Tables A-1, A-7 (January 8, 2009) and from Labor Force Statistics from the Current Population Survey, Monthly Household Data tables, A-36, available at [ftp://ftp.bls.gov/pub/suppl/empstat36.txt](ftp://ftp.bls.gov/pub/suppl/empstat/empstat36.txt) (last visited January 14, 2010).

⁶ NWLC calculations from U.S. Department of Labor, Bureau of Labor Statistics, Current Employment Statistics, Tables B-3 and B-4, available at <http://www.bls.gov/ces/tables.htm#ee> (last visited January 14, 2010).

⁷ Heather Boushey, “The New Breadwinners,” *The Shriver Report: A Women’s Nation Changes Everything*, (Center for American Progress, 2009), page 58.

⁸ U.S. Census Bureau, Current Population Survey, 2009 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2008 – People 15 Years Old and Over by Total Money Earnings in 2008, Age, Race, Hispanic Origin, and Sex, available at http://www.census.gov/hhes/www/cpstables/032009/perinc/new05_000.htm (last visited January 14, 2010).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ U.S. Department of Labor, U.S. Bureau of Labor Statistics, Women in the Labor Force: A Databook, Report 1018 (September 2009), available at <http://www.bls.gov/cps/wlf-databook-2009.pdf> (last visited January 14, 2010).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.* See also Suzanne Riss, *Salary Survey 2005: How Can We Close the Gender Pay Gap?*, NAFE Magazine, Winter 2005, at 18, 22-23 available at http://www.nafe.com/images/NAFE_Magazine/2005salarygap.pdf and http://www.nafe.com/images/NAFE_Magazine/2005salarychart.pdf (last visited Feb. 26, 2007).

¹⁵ See U.S. General Accounting Office, *Women in Management: Analysis of Selected Data from the Current Population Survey 18-19*, GAO-02-156 (Oct. 2001), available at <http://www.gao.gov/new.items/d02156.pdf> (last visited Feb. 23, 2007).

¹⁶ Judy Goldberg Dey & Catharine Hill, AAUW Education Foundation, *Behind the Pay Gap* (2007), available at <http://www.aauw.org/research/upload/behindPayGap.pdf> (last visited April 17, 2008).

¹⁷ U.S. Census Bureau, *Current Population Survey, 2009 Annual Social and Economic Supplement, Table PINC-03: Educational Attainment – People 25 Years Old and Over, by Total Money Earnings in 2008, Work Experience in 2008, Age, Race, Hispanic Origin and Sex*, available at http://www.census.gov/hhes/www/cpstables/032009/perinc/new03_000.htm (last visited January 14, 2010).

¹⁸ *Ibid.* Numbers for high school graduate includes those who earned a GED.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Amy Ciazza, April Shaw, & Misha Werschkul, *Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Region*, Table 3a, (Institute for Women's Policy Research, 2004), available at <http://www.iwpr.org/pdf/R260.pdf> (last visited Feb. 26, 2007).

²³ Jessica Semega, "Men's and Women's Earnings by State: 2008 American Community Survey," U.S. Census Bureau, September 2009, available at <http://www.census.gov/prod/2009pubs/acsbr08-3.pdf> (last visited January 14, 2010).

²⁴ National Women's Law Center calculations based on selected tables, U.S. Census Bureau, *Current Population Survey, 2009 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2007 – People 15 Years Old and Over by Total Money Earnings in 2008, Age, Race, Hispanic Origin and Sex*, available at http://www.census.gov/hhes/www/cpstables/032009/perinc/new05_000.htm (last visited January 14, 2010).

²⁵ *Ibid.*

²⁶ AFL-CIO & Institute for Women's Policy Research, *Equal Pay for Working Families: National and State Data on Pay Gap and Its Costs*, 1 (1999), available at <http://www.aflcio.org/issues/jobseconomy/women/equalpay/EqualPayForWorkingFamilies.cfm> (last visited Feb. 23, 2007).

²⁷ Institute for Women's Policy Research, *Memo to John Roberts: The Gender Wage Gap is Real*, 2 (Sept. 2005), available at <http://www.iwpr.org/pdf/C362.pdf> (last visited Feb. 23, 2007).

²⁸ Jessica Arons, *Lifetime Losses: The Career Wage Gap*, Center for American Progress Action Fund, (December 2008), available at http://www.americanprogressaction.org/issues/2008/pdf/equal_pay.pdf.

²⁹ Olivia S. Mitchell, Phillip B. Levine, & John W. Phillips, *The Impact of Pay Inequality, Occupational Segregation, and Lifetime Work Experience on the Retirement Income of Women and Minorities*, vii (AARP, Sept. 1999), available at http://assets.aarp.org/rgcenter/econ/9910_women.pdf (last visited Feb. 23, 2007).

³⁰ *Ibid.*

³¹ U.S. General Accounting Office, *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings* 2, GAO-04-35 (Oct. 2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-35> (last visited Feb. 26, 2007).

³² See Kimberly Bayard, Judith Hellerstein, et al., *New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data*, 21 *J. Labor Economics* 887, 904 (2003).

³³ *Supra* note 14.

³⁴ Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit*, *San Francisco Chronicle*, Apr. 29, 2003, at B1, available at sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL (last visited Feb. 26, 2007).

³⁵ *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), available at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/\\$file/0416688.pdf?openement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/$file/0416688.pdf?openement) (last visited Feb. 26, 2007).

³⁶ The court consolidated the EEOC's case with a class action by employees alleging race discrimination against

African Americans, Hispanics, and Asians with regards to pay, promotions, and training. The terms of the settlement provide that \$2.4 million will go to plaintiffs with race-based claims. Press Release, Judge Approves \$5 Million Settlement of Job Bias Lawsuits Against Woodward Governor (Feb. 20, 2007), *available at* <http://www.eeoc.gov/press/2-20-07.html> (last visited Mar. 27, 2007).

³⁷ Press Release, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit (July 12, 2004), *available at* <http://www.eeoc.gov/press/7-12-04.html> (last visited Feb. 25, 2007).

³⁸ See Office of Federal Contract Compliance Programs, U.S. Dep't of Labor v. Wachovia Corp., Case No. 2001-OFC-0004 (U.S. Dep't of Labor Office of Admin. Law Judges, Sept. 21, 2004), *available at* <http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=205183>) (last visited Feb. 26, 2007); *Wachovia to Pay \$5.5M in Discrimination Case*, Tampa Bay Business Journal, Sept. 24, 2004, *available at* <http://tampabay.bizjournals.com/tampabay/stories/2004/09/20/daily37.html> (last visited Feb. 26, 2007).

³⁹ AFL-CIO, Ask a Working Woman Survey Report, 9 (2004) *available at* <http://www.aflcio.org/issues/jobseconomy/women/speakout/upload/aawwreport.pdf> (last visited Feb. 23, 2007).

⁴⁰ Memorandum from Greenberg Quinlan Rosner Research to Women's Voices Women Vote, 13 (Feb. 12, 2007) (on file with the National Women's Law Center).

⁴¹ The Paycheck Fairness Act would overturn the DOL's 2006 decision to narrow the scope of its investigations into systematic wage discrimination. See DOL, Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35,124 (June 16, 2006).

⁴² The Act refers to a regulation the Office of Federal Contract Compliance Programs (OFCCP) rescinded on September 8, 2006. See DOL, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey, 41 C.F.R. § 60.2.

⁴³ In wage discrimination cases, an affirmative defense is one that admits the existence of a wage disparity but asserts a legally permissible reason for the disparity.

⁴⁴ 29 U.S.C. § 206(d)(1).

⁴⁵ See, e.g., *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (finding that employer did not violate the EPA for computing minimum salaries for new sales agents based on their prior salaries).

⁴⁶ 29 U.S.C. § 206(d)(1).

⁴⁷ See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).